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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

12 CR 876 (VSB)

6 PAUL CEGLIA,

7 Defendant.
-----x

8 New York, N.Y.
9 May 4, 2015
10 11:30 a.m.

12 Before:

13 HON. VERNON S. BRODERICK,

14 District Judge

15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the
Southern District of New York

JANIS ECHENBERG

ALEXANDER WILSON

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Attorney for Defendant

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Attorneys for Facebook

F46cegc

1 (Case called; in open court)

2 THE DEPUTY CLERK: Good morning.

3 MS. ECHENBERG: Janis Echenberg and Alex Wilson are
4 here from the government.

5 MR. FOGG: Robert Fogg for Paul Ceglia.

6 MR. SNYDER: Orin Snyder and Alex Southwell for
7 Facebook and Mark Zuckerberg.

8 THE COURT: Counsel, we're here in my chambers. I
9 have a court reporter here. So when you speak, please identify
10 yourself before speaking. So we're here to talk about the
11 subpoena response by Facebook and Mr. Zuckerberg. The first
12 issue I want to deal with is, Mr. Fogg, I don't believe there
13 is a requirement that Mr. Zuckerberg perform any of the
14 searches himself. There is no legal basis that I am aware of
15 for that. So I just wanted to dispense with that issue right
16 off. If you have anything to add, I will hear you on it; but
17 otherwise I am going to move on to the next issue.

18 Do you have anything to add?

19 MR. FOGG: Well, Judge, I think what traditionally
20 attorneys do and clients do, just as Mr. Snyder pointed out in
21 his letter to some degree, is they seek assistance of their
22 attorneys to submit and comply with subpoena. However, whether
23 or not I think in my letter is what I spoke to and what I
24 mentioned to the Court is whether or not the consequences of
25 noncompliance can be bestowed upon a client when the attorney

F46cegc

1 is recalcitrant. That is an issue that needs to be addressed.
2 With regard to production in this particular case, I think it
3 also goes to the possibility of qualifications of the attorney
4 who actually do adequate search but then requires some sort of
5 certification. I think that is more likely where I am going.

6 THE COURT: The subpoenas were directed to
7 Mr. Zuckerberg and Facebook. So with regard to any
8 ramifications down the line, if that is what you are referring
9 to, it was served on them. So I don't think there is really an
10 issue there.

11 Now, with regard to some form of certification, I am
12 not inclined to do that but I will as the call progresses want
13 to hear generally about the searches and/or the search for the
14 documents just to get a better sense in my own mind what was
15 done.

16 The next issue I want to deal with is the issue of the
17 redacted documents. I just want to confirm, Mr. Fogg, that the
18 documents that Mr. Snyder has pointed out that have been
19 redacted are documents that previously had been produced I
20 believe by the government. I just want to confirm you are in
21 agreement with that?

22 MR. FOGG: That's what I see, Judge. I gave you the
23 chart and it lists 99 redactions all coming within the
24 previously produced documents that the government produced here
25 in this criminal case.

F46cegc

1 THE COURT: The next issue I want to deal with,
2 Mr. Snyder and Mr. Southwell, is whether or not from a
3 technical standpoint -- this is with regard to the new
4 e-mails -- to produce them in native format.

5 MR. SNYDER: I am not sure whether it will be
6 difficult or not, but we can certainly find the answer to that.
7 I would just say that we obviously produced responsive
8 documents in the same PDF format that both the government and
9 our clients have used throughout the criminal case and which
10 never before prompted a complaint. Neither Rule 17(c) nor the
11 subpoenas themselves require production of records in any
12 particular format. The case law makes clear that the
13 obligation is to produce in reasonably usable format, which we
14 did, and so we believe we complied with that obligation and
15 certainly we can look into it today and let the Court know if
16 it has been a standard practice in this case and that is why we
17 did it in that way.

18 THE COURT: Look, the subpoena doesn't specifically
19 say native format, and I understand the process that had been
20 in place with the government; but if they can be produced in
21 native format, I would like that to be done.

22 As I understand it, Mr. Snyder, you referenced
23 something in the civil case. Were items produced in native
24 format from Mr. Ceglia? I think you mentioned it took an order
25 in order to get that done. Have native documents been

F46cegc

1 produced?

2 MR. SNYDER: In the civil case because of the
3 authenticity of the e-mails and because the expedited discovery
4 there focused on the authenticity of the purported contracts
5 and the fake e-mails, we did seek specifically production of
6 all records in native format from Ceglia. The Court ordered
7 native filed production by all parties accordingly.

8 THE COURT: As I understand your letter, the new
9 e-mails that were produced by Facebook and Mr. Zuckerberg, I
10 take it those were not produced, that these are new to both
11 cases?

12 MR. SNYDER: Yes.

13 THE COURT: So if you could check that that would be
14 appreciated.

15 MR. SNYDER: I think there were 16 in total new
16 e-mails -- new documents rather. We indicated Bates number.
17 We'll see how onerous, if at all, they are to produce in native
18 format.

19 THE COURT: Mr. Fogg had raised the issue of various
20 locations where data might have been stored. I constantly see
21 these references to these 28 devices. I guess my question is,
22 Mr. Snyder and Mr. Southwell, would you be able to provide me a
23 sense of what was searched I guess for lack of a better term?

24 MR. SNYDER: Sure. I would say once again without
25 meeting and conferring, Mr. Fogg raised these first with you

F46cegc

1 and then with the press and had he called us, we would have
2 told him he had no basis to suggesting that our firm didn't
3 search all of our client's electronic devices. We have been
4 handling this matter now for more than five years and have full
5 familiarity with and access to all locations of possible
6 responsive materials in Mr. Zuckerberg's various media and
7 sources of electronic communications since 2003. We've ensured
8 and can represent to the Court that we diligently searched all
9 of the locations and produced all responsive documents in
10 response to this subpoena.

11 THE COURT: I guess Mr. Fogg had referenced some
12 material analyzed by Stroz Friedberg, which I guess is the 28
13 devices or hard drives or whatever?

14 MR. SNYDER: Everything has been searched, your Honor.
15 In our diligent search for data and responsive information and
16 carefully, thoroughly reviewed and we produced what was
17 responsive.

18 THE COURT: Okay. Let me just take a look. I guess
19 one question I have because I don't know what was produced in
20 the civil case, I don't have any sense that. Were there drafts
21 of the contract, the street facts contract that were produced
22 in the civil case or in the criminal case?

23 MR. SNYDER: Of the street facts contract?

24 THE COURT: Yes.

25 MR. SNYDER: The copy of the street facts contract we

F46cegc

1 found was of course on Mr. Ceglia's computer on an Adelphia
2 account and also on the Sidley and Austin server and there was
3 only one version of it.

4 THE COURT: I guess there weren't any in the Harvard
5 archives? There wasn't anything in there I take it?

6 MR. SNYDER: No, your Honor.

7 THE COURT: Since you mentioned Sidley and Austin, as
8 I read your letter, and I think this makes sense, the only
9 thing that was in essence requested of Sidely and Austin was
10 this specific e-mail exchange; am I correct? It wasn't a
11 request for any other documents other than the e-mail exchange
12 between, and I apologize, the lawyer at Sidle and Austin and
13 Mr. Ceglia?

14 MR. SOUTHWELL: Yes, your Honor. This was a matter of
15 discussion before the district court in the Western District of
16 New York and specifically authorized a subpoena on behalf of
17 Facebook and Mark Zuckerberg to Sidley for one very specific
18 thing and that was the e-mail exchange on a particular date,
19 which is street facts contract. That was the only thing
20 produced to us and it was produced to Mr. Ceglia simultaneously
21 as it was produced to us because of privilege, etc. It is the
22 only thing we sought and were authorized by the court to
23 obtain. We assume there is more, but we don't have it.

24 THE COURT: I assume that is why that one of the
25 nature of the requests was so targeted because of the fact that

F46cegc

1 the privilege issues?

2 MR. SOUTHWELL: Yes, your Honor.

3 THE COURT: I think that's all I have.

4 Mr. Fogg.

5 MR. FOGG: Yes, your Honor. First, the request for
6 native forms, Judge, I understand that the government has
7 produced documents for the subpoena requires or at least
8 requests that Facebook and Zuckerberg -- (in audible) --
9 whether it was produced in a civil suit or whether or not the
10 government. Therefore, I request the native documents, the
11 native form of the documents that even the government produced
12 particularly since they have possession, custody and control of
13 them. That is an issue, Judge.

14 THE COURT: Let's back up a second because the
15 government has produced various documents already. Are you
16 suggesting or requesting that the government produce or
17 reproduce all the documents they produced to you in native
18 format?

19 MR. FOGG: I am requesting that Facebook produce their
20 documents, whatever documents they are. Not to assume that I
21 already have or they were given to Ceglia on another case. I
22 am asking them to produce their documents.

23 THE COURT: Well, I would say this: With regard to
24 these new e-mails, as long as it is not something that is
25 onerous or technically extremely difficult, I would ask that,

F46cegc

1 Mr. Southwell and Mr. Snyder, that your clients do produce the
2 new e-mails in native format.

3 MR. FOGG: Judge, I see there are 76. There are 60
4 miscellaneous e-mails of unknown source. That is Bates stamped
5 from 2003 to 2062. There is also 15 retyped excerpts of
6 instant messages, which looks like one conversation. Those are
7 the ones that would have to be produced in native forms that I
8 see. There are approximately 99 from the government that if
9 they had in -- if they had possession of those, those are the
10 ones I will be requesting. I request them to produce rather
11 than reproduce what the government already produced. Instead
12 of regurgitating what the government produced, they will
13 produce it in native form.

14 THE COURT: But the subpoena, right, as I understand
15 it they reproduced stuff and they weren't required to reproduce
16 it. You have the new documents that are going to be produced
17 in native format. Are you requesting that documents that they
18 have already produced that they be produced in native format?

19 MR. FOGG: Yes, Judge.

20 THE COURT: Look, to me that is a separate issue. I
21 would like to hear from you what the volume you are talking
22 about is and why you believe with regard to these other
23 documents native format is something that is necessary when it
24 hasn't been heretofore something that either the government or
25 you quite frankly have requested.

F46cegc

1 MR. FOGG: The production was made prior to my entry
2 into the case. Upon reviewing the production, I believe it is
3 over a thousand pages of e-mails. They are all in PDF form.
4 The one e-mail I saw, which is the August 2003, August 18,
5 2003, e-mail, where Zuckerberg says that he hasn't sent my
6 client this since he sent him the contract. The problem is
7 Mr. Zuckerberg also gave a statement where Paul gave him the
8 contract. Now, in that e-mail he is saying that he gave the
9 contract.

10 Metadata is very important. But I would say that the
11 metadata that is associated with these documents are very
12 important because we're also talking about time frame,
13 contracts. It is my understanding that Paul and Zuckerberg --
14 Ceglia met in Boston face-to-face and they each signed
15 documents face-to-face. If in fact Zuckerberg sent him a
16 contract, that had to be a proposed contract because they
17 didn't sign it face-to-face. It is one that he sent.
18 Therefore there has got to be some sort of document that he
19 sent. He could have not sent the actual signed contract. That
20 is not possible. So therefore any document that they are
21 talking about, even if they want us to believe that that is a
22 one in the same, and the document that he sent was a proposed
23 contract because you cannot send him a document without him
24 signing it first. So the metadata is important. Give me time
25 frame, give me certain information that is essential to see if

F46cegc

1 in fact it was fabricated.

2 MR. SNYDER: Your Honor, Mr. Fogg, keeps repeating
3 untruths in the hope that in the hope that somehow--

4 MR. FOGG: It is not untruths.

5 THE COURT: Counsel, one at a time.

6 MR. SOUTHWELL: Mr. Fogg keeps on mischaracterizing
7 the August 18th e-mail. This has been covered ad nauseam in
8 prior submissions and correspondence. There is no record
9 evidence in this case that Mr. Zuckerberg wrote or sent an
10 original contract to Mr. Ceglia. To the contrary the e-mail of
11 August 18 made clear that what Mr. Zuckerberg did is when Paul
12 Ceglia refused to pay for services rendered, Mr. Zuckerberg
13 transmitted a copy of the then executed street facts agreement
14 reminding him that he is owed money and in fact Mr. Ceglia owes
15 penalties for late payment. Far from confirming any
16 fantastical theories of Mr. Fogg, the August 18th e-mail firmly
17 corroborates the fraud because it refers to terms of the street
18 facts contract, the authentic contract, that are not present in
19 Mr. Ceglia's fraudulent contract, which is why Mr. Fogg's
20 continuous reference to it is perplexing at best.

21 In any event, there is no evidence of any kind that
22 there is anything amiss about our PDF productions. And
23 Mr. Fogg's statement that he only came in after the production
24 in the civil case is frivolous because he has had these PDF
25 documents for many months and didn't even bother to pick up the

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1 phone and raise the issue with us before he ran to the press
2 and wrote to this Court.

3 THE COURT: Well, also as I understand it, and let me
4 just ask this question, because I think it implicates the
5 government's production, because as I understand it the
6 documents that were produced or I guess reproduced by Facebook
7 were documents that the government had produced. They may have
8 initially come from Facebook, but they are documents produced
9 by the government.

10 MS. ECHENBERG: I think I can bring some clarity if
11 you --

12 THE COURT: Absolutely. If you could also discuss
13 what apparently I guess is Mr. Fogg's now request for certain
14 documents in native format.

15 MS. ECHENBERG: Yes, absolutely. Just so your Honor
16 is aware, the production of the Harvard e-mails was done after
17 substantial discussion with David Patton, prior counsel, as to
18 how we would do this and in what format.

19 To take a step back, the government received three
20 sets of e-mails from Harvard, and this has been explained in
21 several briefings including in response to Mr. Ceglia's first
22 request for a Rule 17 subpoena from Harvard. So Harvard had
23 backed up Mr. Zuckerberg's e-mail at three points. Once in
24 2003, once in 2010, and once in 2012. So Harvard provided the
25 government those three sets of e-mails. There are some

F46cegc

overlap. Those were provided to the government in data format. They of course contain every single e-mail that Harvard had in its custody at that time for Mr. Zuckerberg. Of course many, many of those e-mails are not relevant to this case at all. So after discussions with David Patton, we agreed that the government as we do in all cases would review the e-mails for relevance e-mails that should be produced under Rule 16 and we would produce those e-mails. We did so in PDF format because we had to pull out the e-mails that were relevant and in many cases redact portions of e-mails or parts of strings of e-mails that were not relevant and so that is what we produced. Those e-mails, at least the 2003 set, have e-mails going back as early as I believe July of 2003. That is just the earliest set that Harvard had.

So that is why we produced them in PDF format. I believe it would be onerous on the government to produce them in a different way. Frankly, I am not sure how we would given the volume that is not relevant or not appropriate to be produced at this stage of the case. Just for context, those three sets of e-mails were produced in December of 2012.

In order for Facebook to respond to the Rule 17 subpoena that they received, they wanted to know what had already been produced. So we provided Facebook with a set of the Harvard e-mail that we had produced so that they could compare that against what they had. They then determined that

F46cegc

1 there was a small set of Harvard e-mails that they had that we
2 hadn't produced. They identified those for us. We went back
3 to our set and we confirmed that I couple of e-mails
4 inadvertently had not been produced. So those were parts of
5 strings or attachments that had not been produced. So we
6 produced those in January of 2015. At no time between December
7 of 2012 and presently has Mr. Fogg ever raised this issue of
8 native e-mail. Then I believe but Facebook can confirm is what
9 they did in their production was to reproduce the set of
10 Harvard e-mails that we had provided them though of course it
11 was the same set we had provided to Mr. Ceglia in December of
12 2012.

13 THE COURT: Mr. Snyder.

14 MR. SNYDER: Thank you, Judge. I just want to point
15 out, and I am going this because I know we're on the record
16 here and it is important that we create this record, we
17 obviously appreciate the Court's allowing us to participate in
18 these proceedings as the crime victim; but as the crime victim,
19 here I just want to note the obvious, which is that Mr. Fogg's
20 series of never-ending requests for broad civil discovery would
21 be under any circumstance since it has been 30 months since his
22 client was indicted and mostly if not all of these issues have
23 been thoroughly discussed with prior counsel.

24 Of course broad discovery is even more appropriate in
25 this case because as the Second Circuit stated in its decision

F46cegc

1 just last Monday, Mr. Ceglia is a fugitive who has, and this is
2 the Second Circuit's language, "repeatedly demonstrated total
3 disregard for our judicial system." That is a quote from the
4 Second Circuit. I would note that to say that Mr. Ceglia comes
5 to this Court with unclean hands would be a gross
6 understatement and we believe as crime victims here that any
7 further obligations on us under those circumstances is unfair
8 and not appropriate. I just wanted to make that point for the
9 record, Judge.

10 MS. ECHEMBERG: Your Honor, if I could just add along
11 those lines. It is the government's view as well that to ask
12 the government to take on any sort of additional burden with
13 respect to discovery is not appropriate right now while the
14 defendant is a fugitive. In addition, we don't see anything in
15 the metadata that would be at all relevant. There is nothing
16 that Mr. Fogg said that relates to metadata. On the face of
17 the e-mails or the dates of the e-mails are the subject and of
18 course the content of the e-mail. There is nothing about the
19 metadata that relates to anything that Mr. Fogg says he is
20 looking for.

21 MR. FOGG: Judge, I guess first and foremost the
22 problem that it we've had so far is that, and I have spoken to
23 Mr. Snyder and Mr. Southwell, I don't trust their production.
24 I think it is self-serving. I was that plain and simple. That
25 is the reason why I requested subpoenas. Now, they have not

F46cegc

1 been subpoenaed before. They have not actually been producing
2 under an order other than the one that they created, which is
3 specifically designed to limit the production which I sought.
4 This production here is very important because it goes to the
5 heart of the matter and it goes to the issue of whether or not
6 there was a contract signed, whether or not the original
7 contract was Paul's, whether or not the original contract was
8 that one contract they produced and actually resized it because
9 it was smaller than a business card and you cannot read it.

10 What is remarkable in this particular case is that the
11 government after so many years just tested the contract and
12 their expert had said nothing about it being fraudulent. They
13 support what our experts say. Now, that would say that Paul's
14 contract is legitimate. Now, no one could ever test the image
15 they produced. No one can ever test that. As far as being
16 crime victims, I disagree with that.

17 As far as producing in a civil case, our two issues
18 that we have here that I feel production was insufficient, the
19 first is where there was 20 electronic devices. They were
20 identified Zuckerberg attorneys, by Mark Zuckerberg as being
21 potentially relevant and that was in a civil case. The second
22 is the Harvard e-mail server backup. Now, that Mr. Zuckerberg
23 had access to. Now, Mr. Zuckerberg and Facebook searched these
24 two groups, these assets as part of the subpoena issued by the
25 Court. They did and they should have.

F46cegc

1 Now, in a civil case, Zuckerberg used that data
2 forensics from Stroz Friedberg to search 20 devices and they
3 were identified by Mr. Zuckerberg's counsel as being
4 potentially relevant. However, under oath with the deposition
5 of Mr. Gallon from Stroz Friedberg, he explained that they
6 never produced a report or their search and they didn't take
7 any notes. I can only assume because they were told not to,
8 but they never did that.

9 Now, if that the case then there are e-mails present
10 on that server from that time that are relevant that were never
11 produced, no notes taken, no reports made. If they are, that
12 means that they didn't produce that in a civil case. So if no
13 reports are made, then I would have to say that no search was
14 done of the 28 hard drives. If that is the case, those 28
15 devices, this subpoena covers that.

16 Now, they have explained numerous times to this Court
17 that in the civil case it was a different subpoena issued in
18 this case. Well, the civil case is a civil case. This is a
19 criminal case. Like I said, I do believe that was specifically
20 designed to limit their search criteria. This was something
21 that they drafted and it wasn't in spirit of what Mr. Snyder
22 said in court.

23 THE COURT: Let me deal with this in this way: As I
24 understand what Mr. Snyder said, they have searched all of the
25 devices that they are aware of and I assume that means hard

F46cegc

1 drives and whatever electronic devices that Mr. Zuckerberg had
2 and that they produced e-mails from those device to the extent
3 they existed.

4 Mr. Snyder, am I mischaracterizing what you guys have
5 done?

6 MR. SNYDER: That's correct, your Honor.

7 MR. FOGG: When was that done?

8 THE COURT: Was that done in connection with the
9 subpoena that was issued?

10 MR. SNYDER: In this case?

11 THE COURT: I am asking Mr. Snyder. I think that is
12 what he had indicated earlier.

13 MR. SNYDER: Yes, your Honor.

14 THE COURT: Mr. Fogg, I think that answers your
15 question. Again, you may not believe that, but unless you can
16 point to something concrete, in other words, something that
17 shows that somehow something has not been done, I have no
18 reason to doubt Mr. Snyder and Mr. Southwell that they have
19 undertaken their obligation to respond to the subpoena on
20 behalf of their client and that they have searched the devices
21 that they are aware of.

22 So with regard to the request for native format, I am
23 not at this time going to direct that the government or
24 Facebook or Mr. Zuckerberg, with the limited exception of these
25 new e-mails that we were discussing, that they get produced in

F46cegc

1 native format. Now, in part because as I understand it some of
2 these things were produced back in 2012 and there hasn't been a
3 specific showing as to why that would be necessary at this
4 stage. So I am not going to direct that either the government
5 or Facebook go back to the prior productions they have made and
6 produce documents in native format.

7 Mr. Fogg, at some future time there are for whatever
8 reasons specific e-mails that you believe you need to get the
9 metadata, I will hear you on those specific e-mails and I will
10 hear you on what short of showing you should make with regard
11 to that; but I am not going to do that now and certainly
12 because I wanted to complete the subpoena production but with
13 regard to any other issues, we can address that when your
14 client is back in custody.

15 MR. FOGG: Understood, your Honor.

16 THE COURT: Is there anything else that we need to
17 deal with?

18 MS. ECHENBERG: Nothing from the government's
19 perspective.

20 MR. SNYDER: Nothing from us, your Honor.

21 THE COURT: Mr. Fogg?

22 MR. FOGG: Thank you, Judge.

23 THE COURT: Thank you everybody for jumping on the
24 phone.

25 Mr. Snyder, if it turns out that you can produce them,

F46cegc

1 just notify me and then get them over to Mr. Fogg when you can.

2 MR. SNYDER: Certainly, your Honor. Thank you.

3 THE COURT: Thank you. Take care.

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